

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division

JOANN WRIGHT HAYSBERT,

Plaintiff,

v.

OUTBACK STEAKHOUSE OF FLORIDA,

LLC,

and

BLOOMIN' BRANKS, INC.,

Defendants.

CIVIL ACTION NO.  
4:24cv87

TRANSCRIPT OF PROCEEDINGS  
(Final Pretrial Conference)

Norfolk, Virginia

January 16, 2025

BEFORE: THE HONORABLE ELIZABETH W. HANES  
United States District Judge

APPEARANCES:

PARKER POLLARD WILTON & PEADEN

By: Mary Teresa Morgan  
Counsel for Plaintiff

McGAVIN, BOYCE, BARDOT, THORSEN & KATZ, P.C.

By: John David McGavin  
Emily Blake  
Counsel for Defendants

1 (Hearing commenced at 10:09 a.m.)

2 THE COURT: Good morning, everyone.

3 MS. MORGAN: Good morning, Your Honor.

4 THE COURT: Madam Clerk, can you call our next  
5 matter.

6 THE CLERK: Yes, Your Honor.

7 Case number 4:24cv87, Joann Wright Haysbert versus  
8 Outback Steakhouse of Florida, LLC, and Bloomin' Brands,  
9 Inc.

10 The plaintiff is represented by Mary Morgan.

11 Ms. Morgan, are you ready to proceed?

12 MS. MORGAN: I am ready, thank you.

13 Good morning.

14 THE CLERK: The defendant is represented by John  
15 McGavin and Emily Blake.

16 Mr. McGavin, are you ready to proceed?

17 MR. MCGAVIN: Yes, I am.

18 THE COURT: All right. Good morning to you all.  
19 Good morning to everyone. It's nice to see you all.

20 All right. Let me just tell you how I'd like to  
21 handle what order I think we'll go in generally, and then we  
22 will get started.

23 I think we'll try to just have you stay seated, but  
24 if we start to get into extensive argument, I'm going to  
25 have you come up to the podium. But as long as I can hear

1 you and our court reporter is doing okay, then we'll have  
2 everyone remain seated.

3 So, what I had hoped to do is, we have a number of  
4 motions *in limine*. There is some additional motions filed.  
5 There is some issues raised in the Final Pretrial Order.  
6 And then I'll talk to you just a bit about my trial process  
7 at the end.

8 Let me just walk through the motions *in limine* to  
9 make sure I understand which ones we're dealing with, and  
10 which ones may have been resolved.

11 From plaintiff's side, there is a facts and brief  
12 filed, but that's not really in my view a pending motion.  
13 It's more informational, and so I don't believe that there  
14 is any reason for me to address that.

15 Do you agree?

16 MS. MORGAN: I do.

17 THE COURT: Now, the treating physician motion *in*  
18 *limine* I think may be resolved based upon which witnesses  
19 you intend to call, but it wasn't entirely clear to me.

20 Is that still outstanding?

21 MS. MORGAN: No. I believe that's resolved because  
22 the only three expert witnesses that I expect to call are  
23 Filler, Haider, and Avrit.

24 THE COURT: Very well.

25 And does the defense agree that then that motion *in*

1 *limine* is resolved?

2 MS. BLAKE: Yes.

3 THE COURT: All right. So, I do think I'll need to  
4 deal with the present sense impression motion *in limine*  
5 issues relating to Dr. Filler, which are raised by both  
6 parties and also relate to his PowerPoint demonstrative; the  
7 admissibility of the two work orders; the brain map  
8 demonstrative, which is raised by both parts. There is a  
9 request for judicial notice.

10 Defendants, in addition to those that were  
11 duplicative of issues raised by plaintiff, makes a motion to  
12 exclude corporate indifference, exclude internal policies,  
13 and then they've made a separate motion relating to  
14 supplementation, which I think we'll need to address.

15 Any other motions *in limine* that you think have  
16 been resolved or are pending that I didn't just list,  
17 Ms. Morgan?

18 MS. MORGAN: I don't believe so, Your Honor.

19 THE COURT: Okay.

20 Ms. Blake, are you going to handle this part?

21 MS. BLAKE: Yes.

22 MR. MCGAVIN: Your Honor, may I say that we may  
23 share and split up some of these motions depending upon  
24 which one you take.

25 THE COURT: Very well. That's no problem.

1 MR. MCGAVIN: We'll work together.

2 MS. MORGAN: And, Your Honor, I do think that there  
3 will be one or two issues that may resolve some of the  
4 global stuff, if you'd like me to address that after. Thank  
5 you.

6 THE COURT: All right.

7 MS. BLAKE: I agree that --

8 THE COURT REPORTER: I'm sorry. Is your mic even  
9 on?

10 MS. BLAKE: It is not.

11 I agree that resolves all of the outstanding  
12 issues.

13 THE COURT: All right.

14 So, Ms. Morgan, do you want to address, you said  
15 that there are one or two issues that may resolve?

16 MS. MORGAN: Yes. So, first of all, I think I've  
17 made the decision, along with my partner, that we would like  
18 to go ahead and dismiss Bloomin' Brands as a defendant. The  
19 condition, caveat that I would add to that is, I would like  
20 to be able to either have the jury instructed by the Judge  
21 or no preclusion of making reference to them during the  
22 trial, because I think otherwise the jury will be confused  
23 about their relationship, because some people do work for  
24 Bloomin' Brands as the franchiser. So, I don't know if just  
25 explaining to the jury preliminarily that they are the

1 franchiser -- I have done a preliminary instruction on this  
2 type of thing before -- but they're not a party to the  
3 lawsuit. So, that would just be my only request of the  
4 Court. I think that could deal with some of the issues that  
5 we have pending today.

6 THE COURT: All right.

7 MS. MORGAN: The second one is that with respect to  
8 Work Order 2, I have looked at this issue exhaustively, and  
9 I do agree that it would constitute a subsequent remedial  
10 measure under 403, I think -- 407, excuse me. That  
11 particular rule of evidence has exceptions. I don't believe  
12 any of them apply because I am not -- as you might imagine,  
13 from my previous statement just a moment ago -- trying to  
14 show ownership and control, but we will still argue over  
15 Work Order Number 1, but I think that will eliminate some of  
16 this as well.

17 THE COURT: All right. I want to make sure I  
18 understood what you were saying. I understand your point  
19 about dismissing Bloomin' Brands and that there is some  
20 effect on prior arguments you made relating to Work Order 2.  
21 I'm just not clear, is Work Order 2 still at issue or?

22 MS. MORGAN: I don't believe so, because we're not  
23 going to seek to introduce it or make reference to it.

24 THE COURT: Okay.

25 MS. MORGAN: I'm sorry I wasn't clear.

1 THE COURT: So, that would take care of the  
2 admissibility relating to Work Order Number 2?

3 MS. MORGAN: Correct.

4 THE COURT: All right. Anything else?

5 MS. MORGAN: I think that's it from our standpoint.

6 THE COURT: As to your first point relating to  
7 reference to Bloomin' Brands, I mean, I've seen this in  
8 other cases, whether it's a stipulation or something that I  
9 simply explain to the jury in my preliminary instructions  
10 that say, you know, you may hear defendants referred to  
11 as -- and you guys can talk about this language -- but  
12 Bloomin' Brands or Outback Steakhouse, and so just simply  
13 explain whatever it is that you need to explain so that they  
14 can understand the testimony.

15 Mr. McGavin, I don't think you need to necessarily  
16 decide, but I think it's helpful for you to hear that. To  
17 me, that seems like that would take care of any issues of  
18 reference during the testimony and/or documentation so that  
19 the jury can understand.

20 Do you anticipate other issues that I might not be  
21 thinking about?

22 MR. MCGAVIN: Your Honor, what I would say is based  
23 upon the last trial that we had, there were so many efforts  
24 to inject both Bloomin' Brands and insurance into this case,  
25 I don't know what the plaintiff has planned, and I am

1 extremely cautious that we do not start down that road. I  
2 know that plaintiff wants to persist on this issue of,  
3 "Didn't somebody call Dr. Haysbert after this incident?"  
4 And as we have argued, there is no duty on a corporation to  
5 call afterwards. So, that goes to this corporate  
6 indifference issue. So, I just -- I don't want to get  
7 whipsawed and then get back into corporate indifference or  
8 some of the other issues that were so prominent in the last  
9 trial.

10 THE COURT: All right. So, let me, I think it  
11 could help to go through and rule upon things. You all can  
12 talk afterwards.

13 Ms. Morgan, I appreciate that you're willing and  
14 making attempts, and in my view dismissing one of the  
15 defendants and withdrawing on the Work Order 2 suggests an  
16 effort to streamline the case, and that is appreciated.  
17 That is what everyone should be doing.

18 Mr. McGavin, look, I mean, we've all spent a lot of  
19 time with this case in a way that I don't think anybody  
20 would like to be spending this much time with this case, but  
21 plaintiff now has new counsel, and my expectation is that  
22 we've put those issues to bed, and we're going to get this  
23 case tried. And so, I understand that you are cautious, but  
24 I think we still have to operate in a way in which we are  
25 expecting that everyone is working in good faith to get this



1 case tried in a professional and efficient manner, and  
2 that's, I think, the best way we can proceed at this point.

3 MR. MCGAVIN: I agree, Your Honor.

4 We have other issues as we work through today's  
5 motions that we'll take up on their merits, but I believe  
6 that it's not just Ms. Morgan involved in this case, based  
7 upon the documents that we've received and that  
8 they're -- I'm not sure what's going to happen at trial  
9 regarding Mr. Haysbert, whether he'll be here sitting on the  
10 front row directing traffic. I want to be very clear that  
11 when that starts to happen that we will be -- we will raise  
12 that with the Court.

13 THE COURT: All right.

14 Let's move on, then, to the first motion *in limine*  
15 which is still pending, which relates to --

16 Ms. Morgan, how does she say her first name?

17 MS. MORGAN: Nineveh, I believe. Nineveh.

18 THE COURT: Nineveh, okay.

19 -- Nineveh Haysbert's testimony regarding what  
20 certain patrons had told her.

21 As I understand the motion, what she would testify  
22 is set forth in her declaration, which has now been filed so  
23 many times that I can't see the document number, but it's  
24 been entered as her declaration. And that's your  
25 understanding as well, right?

1 MS. MORGAN: That is correct, Your Honor.

2 THE COURT: All right. Do you have any arguments  
3 you want to make?

4 MS. MORGAN: I think it speaks for itself. It was  
5 filed, obviously, before I got involved in this case. I  
6 don't know that the declaration would necessarily even come  
7 in. I think that the testimony is sufficient, and I think  
8 that when she testifies, it would be something to be raised  
9 as objections for the trial court to consider at that time.

10 THE COURT: All right. I have reviewed this, and I  
11 am going to deny your motion *in limine* for a couple of  
12 reasons.

13 The issue that I see is that what the declaration  
14 says, which we would anticipate her testimony to be, is that  
15 a patron or patrons told her that an employee of the  
16 restaurant was mopping the floor prior to her mother  
17 slipping and falling in the area. I think the problem with  
18 that is, there is no indication -- prior to means before,  
19 but it does not in any way provide any clarification as to  
20 temporally, whether that was moments before or an hour  
21 before, and that creates some problems. Certainly, it  
22 decreases the reliability and the relevance of the statement  
23 itself. But this exception to the hearsay statement  
24 requires that the statement be made while you're perceiving  
25 the event, which certainly does not occur here, or

1 immediately after. And it's plaintiff's burden to show that  
2 that kind of temporal component is met; that's so that it's  
3 reliable. And they can't, they can't meet that burden given  
4 what the testimony is. It is classic hearsay testimony, and  
5 I don't find that the exception applies.

6 MS. MORGAN: Your Honor, if we were able to elicit  
7 some information that -- I think it's actually double  
8 hearsay -- but if we were able to elicit some information  
9 about when this occurred from Ms. Nineveh -- of course, I'm  
10 sort of at a disadvantage because I did not try the original  
11 case, and I'm in the process of going through everybody's  
12 testimony and deposition testimony. But that would be the  
13 only exception I would ask, is that if we could put some  
14 limits on the parameters of it, maybe just in a sidebar  
15 without publishing it to the jury first; that's what I would  
16 ask.

17 THE COURT: I'm happy to revisit the ruling  
18 depending on her testimony, but I think you have an uphill  
19 battle, frankly.

20 MS. MORGAN: I don't disagree.

21 THE COURT: All right. Let me deal, then, with the  
22 first work order. This is a work order dated March 7th of  
23 2018, which is prior to the incident at issue in the case  
24 and indicates: "The floor up front needs replaced; floor  
25 not refinished correctly; lots of slips and falls; when the

1 temperature changes outside, it tends to collect moisture  
2 and sweat."

3 Let me ask you, do the parties agree as to who  
4 authored this work order?

5 MS. MORGAN: I believe so.

6 THE COURT: That would be Mr. Wilson?

7 MS. BLAKE: Yes.

8 THE COURT: Okay.

9 Now, Ms. Morgan, there has been some debate here as  
10 to whether or not the work order is evidence of the  
11 feasibility of precautionary measures. I think, though,  
12 that that may have been abandoned; is that correct?

13 MS. MORGAN: Yeah. I don't believe that that's my  
14 theory. The work order, in my view, constitutes potential  
15 constructive notice to the defendant in this case. As the  
16 plaintiff, which is the side I'm not normally on, but as the  
17 plaintiff, I have the burden of establishing notice. I can  
18 do that a number of different ways.

19 If you look at the *Memco Stores versus Yeatman*  
20 case, which is 232 Virginia 50, that's a case that's  
21 somewhat analogous to this. This is the plant case where  
22 the defendant furniture store I believe had a -- I'm trying  
23 to think of the name of the plant -- pepromia plant that  
24 they had placed on a table, and it was -- essentially, it  
25 became a jury issue, and that's what the Supreme Court of

1 Virginia said, it was a jury issue as to whether the  
2 defendants should have known or reasonably known that it was  
3 foreseeable that this particular plant would lose its  
4 leaves, that it could be on the floor for patrons to slip  
5 on.

6 So, the analogy that I would draw, Your Honor, is  
7 we've got a situation where a work order for the same type  
8 of flooring -- it's not the exact same area, but the same  
9 type of flooring -- is issued in March of 2018. That puts  
10 the defendants on notice that when the weather changes, you  
11 know, that there is some condensation, people are slipping.  
12 You combine that with Deajah Clark, who is an employee of  
13 them, her testimony about witnessing people fall, and it  
14 becomes a jury issue as to whether the defendant had notice  
15 of this particular condition such that they should have  
16 remedied it before Ms. Haysbert fell.

17 THE COURT: So, before I get to the notice issue,  
18 what I'm hearing from your argument is, you're not  
19 attempting to use this record to show that the area of the  
20 floor where Ms. Haysbert slipped and fell is the area of the  
21 floor that was at issue; meaning, you're not seeking to use  
22 the report to say this demonstrates that there was in fact a  
23 defect, and it is that defect which caused her to fall?

24 MS. MORGAN: No. Because it's not that same area,  
25 and I think that was raised a lot in the last trial, so, no,

1 but it is the same type of flooring.

2 THE COURT: The floor itself, I mean, the way I  
3 understand this, and I could be just misunderstanding, but  
4 the same flooring was in the entire front of the house. It  
5 was not changed between this work order and the time in  
6 which Ms. Haysbert fell. Is that right?

7 MS. MORGAN: That's my understanding, yes, Your  
8 Honor.

9 THE COURT: Okay.

10 MS. MORGAN: We're dealing with essentially a  
11 three-month period.

12 THE COURT: All right.

13 MS. MORGAN: It was obviously, as we know, changed  
14 later, but for other reasons which we are not going to bring  
15 up at trial.

16 THE COURT: All right. And so, just let me shift  
17 to defense. I think, let's just be clear about what this is  
18 not about. This is not a subsequent remedial measure. It  
19 happened before. They're not seeking to bring in any  
20 feasibility of precautionary measures. She's identifying  
21 that the issue is notice.

22 Your arguments had been that it's hearsay. You  
23 make an argument that it's not a business record, but I  
24 believe that you previously agreed that it was an authentic  
25 business record at the prior final pretrial conference, and

1 so that issue is -- well, I think it is a business record,  
2 but I think you've also agreed that it is a business record.

3 And so, just let me, then, make sure I understand  
4 what your argument is now. What's your challenge?

5 MS. BLAKE: So, for the hearsay issue, it's double  
6 hearsay. That was what I was trying to point out in this  
7 most recent brief that I filed, was that even if you get  
8 past the business record exception -- which we have  
9 consented to that it is a business record -- Mr. Wilson's  
10 statements within the business record are double hearsay.

11 And so, plaintiff's motion outlined that there was,  
12 you know, sufficient deposition testimony to verify that  
13 Mr. Wilson was employed by Outback at the time. I think I  
14 even only included this as a single paragraph at the end of  
15 our most recent motion. It was just to point out that at  
16 that prior trial no foundation was ever laid at trial. So,  
17 there was no evidence. So, it's inappropriate at this time  
18 to move for the admissibility of this document based on  
19 deposition testimony because we're not at trial.

20 But the real crux of the argument is the relevance  
21 of what I am now understanding.

22 THE COURT: Hold on just one second. Let me just  
23 talk about the double hearsay and make sure.

24 Their argument is that his statements are an  
25 opposing party's statement. He -- I mean, I think you've

1 agreed -- put the work order in, and he had previously  
2 testified regarding that process, and that he was an  
3 employee at the time that the work order was made.

4           Setting aside your argument that that evidence came  
5 in via deposition, are you contesting that if this evidence  
6 came in, in the way it came in at his deposition, that that  
7 statement is not an opposing party statement?

8           MS. BLAKE: I am not.

9           THE COURT: Okay. So, then it's really a relevance  
10 argument?

11          MS. BLAKE: Yes.

12          THE COURT: All right. So, what's your relevance  
13 argument, then?

14          MS. BLAKE: So, and I might be a little bit  
15 confused as to what has changed between the filing of  
16 plaintiff's motion back on December 16 and what is being  
17 represented today, but it sounds like plaintiff's counsel is  
18 now saying that she understands that the work order does not  
19 cover the area where plaintiff slipped and fell.

20          THE COURT: That's my understanding of what she's  
21 saying, it is not the same area. So, it's a notice.

22          MS. BLAKE: But notice as to what, right? So,  
23 notice, they have to prove that there was actual or  
24 constructive notice of the particular defect that caused  
25 plaintiff to fall. It's not just notice that all of the



1 floors are defective all of the time. That's not what the  
2 work order says. The work order says that there is a  
3 particular issue in a particular part of our restaurant  
4 during particular times as a result of particular weather  
5 changes. There has been substantial testimony about where  
6 Dr. Haysbert fell, what caused her to fall. Plaintiff  
7 doesn't know. Dr. Haysbert doesn't know what caused her to  
8 fall. The floor was slippery, according to her.

9 There is no evidence that anybody saw any  
10 condensation on the floor at any time. There is no evidence  
11 that her clothes were soiled as a result. There is no  
12 wetness.

13 The only thing is that Ms. Haysbert, Nineveh  
14 Haysbert, intends to testify that she saw somebody dry  
15 mopping. But just because somebody is dry mopping after the  
16 slip and fall doesn't even mean that there was moisture on  
17 the floor, or if there was moisture, that it was  
18 condensation. So, it's just kind of like when you walk  
19 outside and you look at a puddle, you assume that it has  
20 rained, but that's not the only explanation for the puddle.  
21 Just because somebody was dry mopping on the floor does not  
22 ipso facto mean that there was condensation on the floor  
23 that was similar to the condensation described in this work  
24 order.

25 THE COURT: All right. Just give me just one

1 moment.

2           So, let me deal with this in two steps. The first  
3 is a question about whether or not the record can come in as  
4 a business record or whether it's hearsay. Really, when  
5 you're talking about kind of those types of evidentiary  
6 questions, I think it is proper for me to consider  
7 Mr. Wilson's deposition testimony regarding whether or not  
8 the statements he makes in the exhibit are party statements,  
9 and so that I think is appropriate to rule on currently and  
10 doesn't need to wait until trial.

11           And so, on the hearsay objection, I'll overrule the  
12 hearsay objection, finding that this document does satisfy  
13 an exception to the hearsay rule as an authentic business  
14 record containing opposing party's statements.

15           As to the relevancy objection, I am going to also  
16 overrule that. I do think there is some risk that the  
17 argument could be made it is a confusion, it is this defect  
18 which existed, or it's evidence of the defect, or alleging  
19 that, you know, it is the same hazard essentially.  
20 Ms. Morgan has been fairly clear that that's not her theory,  
21 and so obviously the expectation is she's not going to delve  
22 into testimony like that. But it is evidence of notice.  
23 The order does say "the floor up front," and it talks about  
24 not just this condensation issue but also the refinishing of  
25 the floors, and so I think it certainly is evidence of

1 notice. It's probative of that fact, and I think that the  
2 jury can understand that, and the risk of prejudice is not  
3 so great that the document should be excluded on that basis.

4 Any questions about that?

5 MS. MORGAN: No, Your Honor.

6 THE COURT: The second work order has been dealt  
7 with.

8 Defendants, I know I'm going a little bit out of  
9 order here, but there has been some question about  
10 witnesses. I think that Ms. Morgan has clarified which  
11 experts she intends at this moment to call. Certainly, I  
12 think that could change depending on we have some additional  
13 rulings to deal with, but I think that issue has been  
14 resolved.

15 Is that right, Mr. McGavin, or is there still some  
16 question regarding witnesses generally that we need to  
17 address?

18 MR. MCGAVIN: I think Ms. Blake is handling that  
19 piece.

20 THE COURT: All right.

21 MS. BLAKE: I think that, yes, as long as we can  
22 finalize which experts are intended to testify, that will  
23 help us not expend so many costs as we did at the last trial  
24 relating to our experts.

25 THE COURT: All right. So, at this point it's

1 clear it's Dr. Haider, Dr. Filler, and Mr. Avrit. I know  
2 we're going to talk about them in a moment, so we'll deal  
3 with that.

4 All right. So, let's then move to Dr. Filler.  
5 Let's deal with these in two sets. So, there is an initial  
6 challenge that's been raised regarding his initial  
7 disclosure. I have reviewed and been provided his report,  
8 and I have reviewed his testimony previously.

9 My review of the record is that Judge Krask  
10 previously ruled relating to essentially whether or not he  
11 was presenting scientific or specialized knowledge to assist  
12 the trier of fact, and essentially overruled defendant's  
13 objection on that point. And I don't see that defendants  
14 are contesting that he applied reasonable principles and  
15 methods. I think the issue is causation and lack of  
16 foundation.

17 Ms. Blake, am I understanding that?

18 MR. McGAVIN: This one is for me, Your Honor.

19 THE COURT: All right.

20 MR. McGAVIN: Thank you.

21 Yes, that's right.

22 THE COURT: Okay. Do you want to be heard? Do you  
23 want to be heard on that, in addition to anything you have  
24 already briefed?

25 MR. McGAVIN: Yes, Your Honor.

1 Dr. Filler came to trial with a PowerPoint and an  
2 opinion where he had never seen the patient, hadn't read the  
3 medical records, and was trying to offer evidence that she  
4 had a brain injury. And his opinion did not meet the  
5 standard for reasonable degree of medical certainty based  
6 upon an adequate foundation. He was saying, "I have looked  
7 at this film and this could be." And that's not proper.  
8 It's not proper foundation. It's not a proper medical  
9 opinion.

10 And I think the plaintiff concedes, evidently  
11 concedes it was inadequate by the subsequent filing that we  
12 received last week. So, I think the best evidence of why  
13 that opinion is faulty is that the plaintiff at the last  
14 minute is trying to fix it and withheld the report from us  
15 for over a year, after the Court allowed the plaintiff, over  
16 our objection, to take a voluntary dismissal without  
17 prejudice, having been ordered not to supplement, change or  
18 otherwise modify the opinions, which we've complied with.  
19 Two weeks later she went to see Dr. Filler, a report was  
20 prepared and not provided to us. In my opinion, that was  
21 done by Mr. Haysbert -- because Ms. Morgan wasn't even  
22 counsel of record -- which he shouldn't have done.

23 THE COURT: I know we are going to get to this, but  
24 I do want to deal with them in steps, because I think it's  
25 helpful for me to deal with first the initial disclosure and

1 then subsequently this supplementation issue.

2 MR. MCGAVIN: But my point, Your Honor, is it's  
3 difficult to separate them because the second report  
4 demonstrates all of the problems with Dr. Filler's testimony  
5 and why we were so strenuously objecting to him. Because  
6 Dr. Haider wasn't coming, there was no expert to talk about  
7 what her actual condition is. She's never had  
8 neuropsychological testing. So, to allow him to offer these  
9 opinions to talk about this sort of in a vacuum is highly  
10 improper, and it's totally speculative. So, based upon  
11 that, he should not have been permitted to testify at all.  
12 They even showed him -- I forget what they tried to show  
13 him -- both the "Day in the Life" video, he shouldn't be  
14 allowed to talk about that. He never saw it. And there was  
15 another document -- I can't remember right now what it  
16 was -- where he was shown and asked to testify about it, and  
17 he said, "I don't even know what that is." That's further  
18 evidence of the problems with his testimony.

19 THE COURT: All right.

20 Ms. Morgan.

21 MS. MORGAN: Do you mind if I stand?

22 THE COURT: Go ahead.

23 MS. MORGAN: It's just a little easier.

24 Your Honor, thank you.

25 As a preliminary matter, I'd like to raise the

1 point that even though we did file the admissibility  
2 request, this issue was dealt with at the trial by Judge  
3 Smith. There were 70-something pages of her, even before  
4 the jury was brought in.

5 And Dr. Filler did testify in that case. Judge  
6 Smith allowed him to testify after pressing him on certain  
7 points and being cross-examined by Mr. McGavin, and he still  
8 did testify.

9 What we have here is another example of the defense  
10 taking that and using it essentially as if they had deposed  
11 him, which they chose not to do before the trial in the last  
12 case, and now trying to exclude his opinions after he's  
13 already testified at trial. So, I just want to make that  
14 point on the record.

15 Now, when Dr. Filler came in -- we put a lot of  
16 things in our brief -- but he is the inventor of Diffusion  
17 Tensor Imaging, the DTI process. He doesn't do it himself  
18 because it's a procedure that you stick things on their  
19 brain. But he invented that process. So, there are places  
20 around the country where a person goes, and they run the  
21 brain scans.

22 He ran -- he requested -- well, I think Dr. Haider  
23 in connection with him requested the brain scans using that  
24 technology, and then he reviewed it.

25 And when he was at trial, he explained, "I look at

1 the brain scans. Yes, I typically do see a patient" --  
2 which I'll -- we'll get to that in a little bit -- "but in  
3 this case I did not. What I did do was, I looked at the  
4 clinical findings of Dr. Haider." She wasn't there at  
5 trial. She wasn't going to be there. But that's not  
6 necessarily an issue because Rule 407 allows an expert to  
7 rely on other things, whether they personally observed it or  
8 just read it or not. So, I think that was a trial objection  
9 that was raised, and maybe was an issue for Judge Smith,  
10 maybe it wasn't. But it's not like he did nothing in that  
11 trial.

12 His opinions are laid out in his report. The  
13 findings are at Page 2, 6, 25, and 26. His impressions are  
14 at 3, 7, and 26. He puts the brain scans, which he  
15 reviewed -- and the way he explained it at trial is like  
16 it's like somebody looking at a picture of a broken arm and  
17 seeing the break in the arm. It's not just a radiologist  
18 reading it. He's looking at a scan from the technology that  
19 he developed. And then he explained to Judge Smith, "Well,  
20 this is why it was written in the way that it was." He's  
21 actually also a lawyer. I caught that when I read his trial  
22 transcript. But he said, "I can formulate it in a way where  
23 I'm reciting it to a reasonable degree of medical certainty"  
24 -- which he confirmed that he did at trial -- "but I wrote  
25 this as a clinician." Yes, not one that had seen her. But



1 he alluded to the fact that he probably would see her. And  
2 I know we're going to get to this argument about why he did.  
3 But it was contemplated from the very beginning of his  
4 retention that he would eventually see her, he just hadn't  
5 at that point in time. But he said, "I can talk about the  
6 scans." There was a big dialogue with him and Judge Smith.  
7 And he said, "I read her scans."

8 "Well, you didn't see her brain."

9 Well, nobody can see anybody's brain. It's inside  
10 their head. The best evidence of a brain is not just  
11 sitting and looking at somebody, it's reviewing their brain  
12 scans, which he did.

13 So, I think everything that he did was questioned  
14 and within the field that he should be in at this point, and  
15 he was properly allowed in the last trial, and he should be  
16 properly allowed at this trial. And I'll get to the other  
17 stuff later, Your Honor, but that's essentially what we have  
18 to say on that.

19 Thank you.

20 THE COURT: All right. So, let me just deal first  
21 with this, his initial disclosure, and clearly what I'm  
22 considering. I mean, I would not say that it's necessarily  
23 a *Daubert* motion that's been raised, but there is a question  
24 regarding, really, the admissibility of his opinions.

25 And to me, having reviewed both his report but also

1 then his testimony, I agree with Ms. Morgan that this review  
2 of these images, there has not really been a challenge to  
3 whether or not that's a reliable process, and that's not  
4 really at issue. I think given his profession and his  
5 testimony, his review of those scans is appropriate.

6           What his report indicates is that he reviews the  
7 scans, and he, based upon his review of the scans, makes  
8 certain findings, so, you know, the scans themselves. The  
9 first one reveals losses bilaterally in the frontal lobe,  
10 and so that's a finding I think is perfectly appropriate for  
11 him to make given his review of the scans themselves. I  
12 think there is no reason that he would need to evaluate  
13 Dr. Haysbert in order to make those findings. And I think  
14 there is sufficient foundation. He received the scans and  
15 he reviewed them. I think his report makes clear that he  
16 reviewed those images. I don't think there is any issue  
17 with that. And I think, again, it's consistent with this is  
18 the type of information he would review as well as the  
19 information from Dr. Haider in making his opinion, and so I  
20 think those opinions appropriately should come in or could  
21 come in.

22           Regarding his causation, you know, I think that to  
23 the extent that there was some confusion regarding the  
24 language he uses in his opinions, he does clarify that in  
25 his testimony that he provided. And I think he does make a

1 causation opinion, and he makes that to a reasonable degree  
2 of medical certainty, and he testifies to that. To the  
3 extent that there is some confusion with the language that  
4 he uses in the report, I think that's understandable and  
5 explainable, and I don't think it rises to the level that  
6 would justify exclusion on that basis.

7 Now, I do want to be careful about what his  
8 causation opinion is, because he clearly at this point had  
9 not spoken to Dr. Haysbert.

10 Ms. Morgan, you mentioned the review of  
11 Dr. Haider's clinical findings.

12 I just want to be clear, because I don't want to  
13 make a ruling and then for there to be some disagreement  
14 regarding how far his opinion goes regarding causation, and  
15 so certainly, in my mind it would be appropriate. He's  
16 identified certain things within the imaging. And if you  
17 were to ask him, you know, just using this as an example, is  
18 loss of sight consistent with that injury? Because  
19 that's one of the -- I know she hasn't said this, but let's  
20 just say she testified, "I lost my sight." And so, then you  
21 ask him, is loss of sight consistent with what you're seeing  
22 on the scan? And he says, yes. That's one opinion. Kind  
23 of to me a more significant opinion would be, What I'm  
24 seeing here was caused by this specific event.

25 And so my question is, explain to me what you

1 understand his causation opinion to be.

2 MS. MORGAN: I mean, I think that he has concluded  
3 and opined that she sustained a traumatic event, and by  
4 history, because he does say that he relied upon the  
5 clinical information from Dr. Haider -- that's in the trial  
6 transcript at 411. And that trauma he can recognize on the  
7 images, and it's consistent with a trauma to the brain. It  
8 has nothing to do with, you know, why she fell or anything  
9 along those lines, but a fall. And I think the way he  
10 explained it was, in her line of work, where she's primarily  
11 administrative, you know, she's not going to be on a jobsite  
12 banging her head around, but she did by history sustain a  
13 fall, and that fall is consistent with what he's seeing in  
14 the shearing and other images on her brain scans. And so,  
15 there is a causal relationship between the fall and the  
16 resulting images and the resulting problems.

17 Now, I mean, he could be cross-examined on a  
18 multitude of other points. You know, she could have been in  
19 a car accident. She could have done this and this. And  
20 that's why we take depositions, and that's why we  
21 cross-examine.

22 THE COURT: All right.

23 MS. MORGAN: Is that sufficient to answer your  
24 question?

25 THE COURT: It is.

1 Mr. McGavin, do you want to be heard?

2 MR. MCGAVIN: That's not the standard. It's  
3 not it's consistent with. That doesn't meet the standard  
4 for medical testimony. It has to be to a reasonable degree  
5 of medical certainty this was caused by this event. It's  
6 basically serving up a laundry list of potential causes, but  
7 he doesn't have the foundation to link any clinical  
8 correlation of any claimed symptom to this occurrence. It's  
9 just it's out in the atmosphere without a connection.

10 And he is neither designated nor qualified nor  
11 prepared to testify to those things because he read no  
12 medical records. He never talked to the patient. All he  
13 did is receive a scan and write a report that he writes in  
14 every case. And he looked at some images and says, yeah,  
15 this can be consistent with trauma. But he doesn't know the  
16 severity of the trauma. He doesn't know if there was loss  
17 of consciousness. He doesn't know if there was physical  
18 injury or physical indication of injury. He doesn't know if  
19 there was an emergency room visit. He doesn't know that she  
20 left and got in a car and drove to South Carolina, and that  
21 she didn't seek any care until several days later. He  
22 doesn't know that every time she went to her primary care  
23 physician she offered no complaints of cognitive deficits.  
24 He doesn't know any of that history. So, for him just to  
25 say "it's consistent with" does not meet the standard, and

1 therefore it should be excluded.

2 He's limited. If the Court permits him to testify,  
3 he is limited. And if there is no Dr. Haider or somebody  
4 else to link all of this, it's irrelevant, and it doesn't  
5 assist the jury in reaching a conclusion.

6 THE COURT: Ms. Morgan, you had indicated that at  
7 trial -- and this is my recollection -- that he testified he  
8 had reviewed the clinical findings of Dr. Haider with the  
9 scans; is that right?

10 MS. MORGAN: That's correct.

11 THE COURT: What are those documents?

12 MS. MORGAN: They are located in Dr. Haider's  
13 report, and I actually just pulled that up. There is a  
14 neurological evaluation that's 27 pages long, and then there  
15 is a life care plan that follows that. So, that does talk  
16 about what happened to her in the incident. I think that's  
17 all cross-examination area. I mean, he relied on what he  
18 relied on.

19 And maybe I didn't state it right now in the best  
20 terminology, but you were asking me specifically about what  
21 he said in term of causation, but he did say that his  
22 opinions were drawn to a reasonable degree of medical  
23 certainty.

24 THE COURT: All right. Give me just one moment.

25 All right. I am going to overrule the defendant's

1 objection. In reviewing his report -- and I think it has to  
2 be taken together with his testimony -- he does articulate  
3 that his opinions are made to a reasonable degree of medical  
4 certainty. And so, I think the use of this "consistent  
5 with," which is often how it's -- that is a term that's  
6 used, for example, in DNA evidence even. It only goes so  
7 far. There are limitations to his expert opinion, and those  
8 are the points that can be made on cross-examination, but I  
9 don't think it makes -- it doesn't undermine his opinion in  
10 the way that Mr. McGavin is suggesting. And I think when  
11 you look together at the testimony as well as his report, he  
12 was reviewing in those, and there is at least some reference  
13 to this information from Dr. Haider, and so I think it may  
14 not have been entirely clear that he had received that, but  
15 together with his testimony that he had and the language in  
16 the report itself, that's the information that he had. I  
17 think that is the type of information someone in his field  
18 would generally look to, and the opinions that he draws, I  
19 think, are sufficiently reliable to be admitted at trial.  
20 So, on that basis that objection is overruled.

21 Let's now deal with the supplemental expert  
22 designation.

23 My understanding, Ms. Morgan, is that that  
24 supplemental opinion is based upon a January 2024  
25 evaluation, meaning an evaluation done one year ago, that it

1 included an evaluation of her via Zoom, of the plaintiff,  
2 but also during that evaluation there were some  
3 questionnaires and things completed with her. And my  
4 understanding is that neither the report nor that additional  
5 information has been disclosed to the defense, and that the  
6 supplement was made on January 10th, 2025, which was six  
7 days ago.

8 MS. MORGAN: That is correct, Your Honor.

9 I did make reference to Ms. Blake in December, when  
10 we were discussing these motions, that it was my  
11 understanding that she had been seen, but I had not been  
12 able to put my hands on any documentation at that point.  
13 So, I gave what I had to the defense within I think five  
14 business days of when I got it.

15 THE COURT: All right.

16 MS. MORGAN: And I'll explain a little bit more  
17 about that.

18 THE COURT: Go ahead.

19 MS. MORGAN: Do you want me to?

20 THE COURT: Sure.

21 MS. MORGAN: Okay. I understand the defense  
22 argument to some degree. I am almost always exclusively on  
23 the defense side, but this situation is not how they've  
24 couched it to be.

25 So, as you know, Mr. Haysbert was counsel for



1 Dr. Haysbert up until when Judge Smith's opinion revoked his  
2 *pro hac vice*. And I think you've questioned him before when  
3 he was helping her file documents and whatnot, and we have  
4 affirmatively stated that that was the case. That does not  
5 mean that he was not assisting her, and he is not precluded  
6 from doing so, just like he is not precluded from assisting  
7 me in this case because he is former trial counsel, and he  
8 is a licensed attorney. He is not doing any filing. He is  
9 not doing anything in Virginia. He is not conducting  
10 depositions. But he is former trial counsel, and he is a  
11 relative of the plaintiff.

12 And so, he is, contrary to Mr. McGavin's assertion,  
13 entitled to be somewhat involved in this case, and he does  
14 plan to be here. He's not going to sit at counsel table  
15 with me. But this is his mother that is coming to trial, so  
16 we can take that up at a later time.

17 But here's -- I'm going to talk a little bit about  
18 the conditions that were imposed, and what I felt my  
19 obligations were, and then how the supplemental reports came  
20 to be.

21 Now, of course, the voluntary dismissal, the  
22 hearing on that, the motion to clarify, which I was involved  
23 in the order on the motion to clarify, all came down between  
24 December and April of 2024, well, December of 2023, April of  
25 2024. There were certain conditions that were laid out by

1 the Court including, you know, no refiling in the Eastern  
2 District, no additional discovery, pretrial determinations  
3 procedurally the same, and then the one expert's withdrawn  
4 was the Court revoked that.

5 I do not see providing supplemental reports as  
6 engaging in additional discovery. I am not asking  
7 questions. I am simply turning over material that I have.

8 Now, I personally had no involvement in plaintiff's  
9 decision to go see Dr. Filler, but that, as I mentioned a  
10 moment ago, was in January of 2024, long before I was  
11 involved, at least in this part of the case as a primary  
12 player, and it was contemplated from the beginning of his  
13 representation.

14 I will say this, too, Your Honor. When you have a  
15 mistrial, it presents a very unique set of circumstances.  
16 You can say we're going to freeze everything, and it all be  
17 the same, but the reality is that it doesn't, it doesn't  
18 really work like that because lives go on, and people need  
19 care, and they need treatment.

20 So, what my understanding is, is that she at trial  
21 -- what happened was he met with her, and because she did  
22 need treatment -- he actually was there, as I mentioned just  
23 a few moments ago, in more of a clinical role, and it was  
24 his intention to see her. So, he did see her on January 3rd  
25 of 2024.

1           Now, let's talk about my duty to supplement. Rule  
2 26 is very specific. There is a must supplement when I get  
3 it, okay? That is an ongoing obligation, not just in state  
4 court but in federal court.

5           So, let's just pretend for a moment that between  
6 August of 2023 and January of 2024 or even January of 2025  
7 something else had happened. Let's say that there had been  
8 a change in the medical field such that it changed his  
9 opinions, or he invented something else. Or from Brad  
10 Avrit's standpoint, let's say that there had been a change  
11 in engineering principles that caused something to change.  
12 Or maybe there was a change in the law. All of those  
13 situations would have required me to disclose.

14           Just like if there is a motion to continue because  
15 the Judge has COVID or a party has COVID, and the plaintiff  
16 continues treating, those conditions are -- they're required  
17 to be told to the defense, and that's why I told them.

18           Imagine for a moment if I had put Dr. Filler on the  
19 stand without supplementing, and on cross-examination  
20 Mr. McGavin asks him, "Well, Dr. Filler, you never saw the  
21 plaintiff." And he says, "Well, actually I did." Don't you  
22 think that they would be a little upset if I hadn't told  
23 them about that situation and supplemented? Absolutely. I  
24 would be as a defense attorney. So, I felt that it was my  
25 obligation to do that, and I did it as soon as I could.

1           Now, in terms of the timing, I haven't been  
2 involved in this case for very long. I have the  
3 disadvantage of coming in and not even being a plaintiff's  
4 attorney. But as I mentioned, it was always intended for  
5 plaintiff to be treated by him, and in fact there were  
6 several times during his testimony where he referenced, you  
7 know, "I'm a clinician. I see my patients. I plan to see  
8 my patients." He has extensive experience and specialized  
9 knowledge in that area, and he met with her at the time of  
10 trial, and they decided, it's my understanding, at that time  
11 to have her follow-up care.

12           And if you have read his supplemental report, he  
13 has in fact seen her. He has put her on medication. He is  
14 essentially now a treating physician, although he's already  
15 -- you know, I wasn't going to change his status and call  
16 him that, but that's essentially what he is, and I think  
17 he's even made a conclusion that some of her effects are  
18 reversible. And for Dr. Haysbert this is not just about  
19 this case, this is about her health, and so that's why she's  
20 seeing Dr. Filler.

21           Now, Avrit, I'll just touch on this briefly because  
22 I know that's an issue as well. And actually, this is  
23 entirely my fault, Your Honor. I was very curious as to  
24 whether Mr. Avrit had supplemented his report, because when  
25 I went through it, I said, you know, in his initial report

1 he referred to some climatological changes and conditions,  
2 and that was on Page 2 and 4 of his initial report.

3 And so, I talked to Nazareth and I said, hey, when  
4 you were trying to get trial counsel involved -- those 15  
5 attorneys or more that he tried to relate or tried to get  
6 involved in the case before I got in -- "did you have them  
7 look at anything? And he said, yes. I sent them his  
8 report, and a lot of the feedback I got was, beef up this  
9 report, because he does talk about it, but yet he doesn't  
10 clarify it.

11 So, what I had printed and given to counsel was  
12 dated January 10th, 2025. That is not the date that Brad  
13 Avrit prepared his report. It is actually dated  
14 February 8th, 2024, so almost a year ago.

15 Now, what happened, and the reason that I say it's  
16 my fault, I didn't catch this at the time -- and there is  
17 the February time -- when Nazareth sent this to me, because  
18 it was in his files, I looked at it, and I saw it, and I saw  
19 it hadn't been signed. So, this copy that's dated  
20 February 8th, when it was penned, was not signed. And I  
21 contacted Brad Avrit's office and I said, hey, you need to  
22 sign your report. That's a requirement under the federal  
23 rules. So he did. And when he signed it, it redated it for  
24 January 10th of 2025. So, this report was actually prepared  
25 a year ago. And when I got it, I turned it over again for

1 the same reasons that I turned over the Filler report, which  
2 was because I felt like I had an obligation to do so. And  
3 it's not entirely new matter. There is -- I went through  
4 and, yes, there is some additional data but, again, it was  
5 considered back in 2024, and it's merely clarification of  
6 what he initially talked about, which is what he was  
7 recommended to do when other attorneys, other than myself,  
8 looked at the file in this case in contemplating whether  
9 they would take the case or not.

10 Thank you.

11 And I'll pass up that February copy.

12 THE COURT: Thank you.

13 MS. MORGAN: And you can see it's the date and it's  
14 not signed.

15 THE COURT: I am going to try to take these a  
16 little bit separately.

17 Setting aside I think this issue with Mr. Haysbert,  
18 there is some allegations made regarding his involvement,  
19 I'm just going to put a pin in those for right now.

20 Let me just deal with the supplemental. I think  
21 Ms. Morgan is likely right about her duty to supplement.  
22 The issue here is that we are at the final pretrial  
23 conference. These documents, the supplements themselves,  
24 were drafted a year ago. And they are, in my view,  
25 especially more Mr. Avrit's than Dr. Filler's, not really

1 supplements to begin with, but shoring up of opinions in a  
2 way that's very beneficial to plaintiff and detrimental to  
3 defense, and the problem is, is that it just would be  
4 fundamentally unfair to the defendants to have to suddenly  
5 deal with these new opinions, the facts upon which they're  
6 based, without an opportunity to have a new opportunity to  
7 depose these witnesses, to investigate the claims that they  
8 have made, to look behind the opinions themselves.

9           And so, I can recognize I think that, Ms. Morgan,  
10 you may have been in a bit of a tight spot regarding what to  
11 do with them. I think, like I said, you likely probably did  
12 have to supplement, but that's a separate issue from whether  
13 or not those opinions reflected in the supplemental reports  
14 should come into evidence at trial.

15           And based upon the failure to timely supplement and  
16 the nature of the supplementation, I don't find that they're  
17 appropriate, and it is not evidence that should come in at  
18 trial. And I think that that's just fairly clear.

19           Now, I think you're right in that supplementation  
20 when there is changing, for example, medical circumstances  
21 could be necessary or appropriate. But the other side has  
22 to have sufficient time and information to respond to those,  
23 and they don't have that here. And so, I think it's very  
24 clear from a timing standpoint and fairness that those new  
25 opinions and their opinions based on review of any new

1 information is excluded from the trial.

2 I know you have made other kind of -- you've asked  
3 for some other additional relief, but let me just first  
4 understand, is that clear? Do you think that raises -- are  
5 there questions that either party has regarding  
6 implementation of that at trial?

7 Defense?

8 MR. MCGAVIN: I do, Your Honor.

9 THE COURT: Go ahead.

10 MR. MCGAVIN: I followed the court order. I have  
11 not gone to my experts and asked them to do supplemental  
12 work, develop supplemental opinions, read supplemental  
13 records. I have done none of that.

14 The Court's order was very clear. Your order, over  
15 my objection, allowed a dismissal without prejudice and said  
16 no new experts are coming, no supplementation, and that  
17 order couldn't have been clearer. I complied with it  
18 100 percent.

19 Then Your Honor granted the motion to reconsider to  
20 allow potentially all of the experts to come in, which  
21 plaintiff's team knew, and they failed to comply with it.  
22 And there should be a penalty because I would like to have  
23 my experts doing supplemental reading, supplemental  
24 research, supplemental literature to improve their opinions.  
25 But now I'm in the position with both of these experts that



1 they're irreparably tainted.

2           Filler is definitely going to take the stand, and  
3 when I say to him and say, you've never seen this lady and  
4 treated her, what are we going to do? How can he possibly  
5 testify at that point? He's going to say, well, at the time  
6 that I wrote my report I hadn't seen her, but I have,  
7 Mr. McGavin. I mean, how are we going to possibly deal with  
8 this?

9           And it's a deliberate -- this is what's so  
10 frustrating in this case -- this is a deliberate ignorance  
11 and a deliberate effort to go around Your Honor's orders.  
12 And if Mr. Haysbert is actively assisting in this case and  
13 working with Ms. Morgan, then he knows about the order. I  
14 would like to see the emails to these guys. They should  
15 have produced the emails so I could know what the  
16 communication was and whether they were notified.

17           The Court has said you really can't do anything  
18 further; the case is where it was when it was tried back in  
19 August of 2023. And we've abided by that.

20           And to get this a week before trial with no  
21 explanation other than, I didn't have it available to me.  
22 That's code for Mr. Haysbert had it. He's working behind  
23 the scenes. And now Ms. Morgan is saying, I'm just reading  
24 through the transcripts to learn about this.

25           This is not fair. And it's more than fundamentally

1 unfair to say these reports can't be used. How are we going  
2 to have Dr. Filler on the stand and have him  
3 compartmentalize in his own brain what was in his opinion  
4 that he offered in August of 2023, compared to now he's a  
5 treating physician, prescribing medication?

6 I'm going to have to ask -- I want to ask  
7 Dr. Haysbert, have you had any medication for these  
8 treatments? Today is the first I've heard of that. If  
9 she's had any medical care, seen a healthcare provider, seen  
10 a family physician, physical therapy, cognitive therapy, I  
11 have none of that. And I am absolutely hamstrung now based  
12 upon what else they may have done.

13 And so, to allow Dr. Filler to testify, I  
14 strenuously object. He's tainted. They violated the court  
15 order. They didn't timely supplement. And to say, I didn't  
16 have it available, and it's a year later -- if I did that on  
17 my side, there would be a penalty. In the Federal Court,  
18 U.S. District Court in the Eastern District, there would be  
19 a penalty. I would get penalized. And it's more than you  
20 just can't have the supplement. Dr. Filler is irreparably  
21 tainted.

22 Alternatively, Your Honor, I want a continuance. I  
23 want a continuance so I can take his deposition. I want to  
24 know the sequence of how this occurred. I want to know who  
25 was involved. I want his emails about how this took place.

1 I want to know what treatment has been done.

2 This is absolutely outrageous, and it's not -- you  
3 can't just stand up in front of the Court and say, you know,  
4 I just didn't have it available, but I'm going to supplement  
5 it, and, you know, we'll just kind of separate it all out.

6 There was a specific court order. It was a  
7 draconian measure to grant a mistrial. The Court then gave  
8 the plaintiff a break to allow her to dismiss without  
9 prejudice, then relented to allow all of the experts to  
10 come. And rather than put Mr. Haysbert up here to explain  
11 what he was doing, Ms. Morgan is offering, you know, her  
12 involvement and don't penalize me.

13 But this is irreparably unfair, and I should not  
14 have to now confront and cross-examine Mr. Filler or  
15 Dr. Filler about how he's going to separate all of this out.

16 I feel that I am extremely prejudiced, and I want  
17 to be able to go to my experts and have them supplement  
18 their reports and do additional preparation. And then I'll  
19 just say to them, look, all of the extra stuff you've  
20 learned, keep that separate in your own brain, and that will  
21 be good enough to comply with the court order.

22 As to Mr. Avrit, we have more foundational  
23 objections to his opinions because they're irrelevant.  
24 There is no evidence it was raining that day. That's his  
25 preliminary opinion. So, we still have that out there to be

1 resolved.

2 But fundamentally, Your Honor, we feel that this  
3 has tainted this case, that to take the key witness -- and I  
4 don't know what Dr. Haider has been doing. Is there any  
5 supplement about her? Has she been communicating with  
6 Dr. Filler? I don't know.

7 And I don't know what Mr. Haysbert has been up to.  
8 Obviously, Ms. Morgan doesn't.

9 So, I'm very, very, concerned, Your Honor, and feel  
10 that we are being severely prejudiced.

11 THE COURT: So, Mr. McGavin, I want to talk through  
12 this just a bit because -- and the reason I'm trying to  
13 compartmentalize a bit is because I'm going to deal with at  
14 the end any issues regarding Mr. Haysbert, and so I hear  
15 your concerns about that. I recognize you're saying, well,  
16 look, there is some overlap. But I'm also trying to move us  
17 along. So, let's just put that in a box for later.

18 Then there is this issue about Dr. Filler. Now, it  
19 is, of course, an issue a bit, and it would have been and  
20 will be regardless, in that Dr. Haysbert has continued to  
21 live her life. If she, for example -- you know, I think  
22 she's still working.

23 MR. MCGAVIN: She retired.

24 THE COURT: Okay. She's retired.

25 But the point is, is we can handle it in a couple

1 of different ways, and this would happen in a normal trial,  
2 where you depose a plaintiff, and it may be that they get a  
3 job after you deposed them that might be relevant to  
4 whatever you want to cross-examine them on. So, you're  
5 either drawing a line and saying, we're going to completely  
6 ignore anything that happened, and she herself couldn't  
7 testify about her current abilities right now, right? But  
8 that does create some issues because you'd have to be very  
9 careful in your questioning about her, to her, about her  
10 abilities, or if she's still working. And so whereas at the  
11 first trial you would have asked, "You're still working,  
12 right?" "Yes, I'm still working." Well, if you ask that at  
13 our trial, she's going to say, "No, I retired." Right? And  
14 so, something has changed. Something has changed, okay?  
15 We'd have to figure out how to deal with that regardless.

16 MR. MCGAVIN: Yes.

17 THE COURT: I think that consistent with how a  
18 normal trial would work, that typically a plaintiff would be  
19 permitted to testify to things that had changed after their  
20 deposition; or if a trial gets moved, if something happened  
21 in that interim period, they could testify about that, and  
22 you could cross-examine on that.

23 Related to that is then this issue of whether  
24 Dr. Filler is tainted. The reason I bring the first issue  
25 up is because your argument, to me, it kind of misses the

1 point a bit in that when she testifies, she's not going to  
2 draw a line in the sand about her abilities and things like  
3 that. Is that what you would expect if Dr. Haysbert  
4 testified, what to expect on cross-examination? What would  
5 you expect her to testify about?

6 MR. MCGAVIN: Let me answer that question this way.  
7 Yes, I would expect her to testify to her current status,  
8 but I would expect that I would be allowed to take her  
9 deposition, a supplemental deposition. But --

10 THE COURT: You didn't ask for that even before  
11 this. I mean --

12 MR. MCGAVIN: Well, let me just finish this  
13 thought, Your Honor. Because the Court granted this new  
14 trial and allowed the plaintiff to come back, then I would  
15 expect that if there is going to be anything supplemental or  
16 changed, that we would have to come back to the Court and  
17 get that. So, we've stood by and not done anything  
18 additional, but typically if --

19 So, you're saying it's on me, I should have asked  
20 for a supplemental deposition and required the plaintiff to  
21 supplement?

22 THE COURT: No. I'm trying to understand because  
23 what you're saying to me seems inconsistent. You're saying,  
24 I would expect the plaintiff to testify to her current  
25 abilities, current status. "Are you taking medication?"

1 "Yes, I'm taking medication now. I'm taking" -- you know,  
2 if she's taking something -- "this is what I'm taking."

3 So, I think what I understood you to say was that  
4 you would expect and find it to be appropriate that  
5 plaintiff in providing her testimony would testify to things  
6 like that. And I'm not trying to trap you. I'm literally  
7 -- I think this is a complicating thing to try to figure out  
8 given the timing problems. And so, I think that's what  
9 you're saying, but I just want to confirm that that's what  
10 you're saying.

11 MR. MCGAVIN: I would, Your Honor, but not in the  
12 confines of this case, the way this developed. We went to  
13 trial in August of 2023. The plaintiff then refiles, and  
14 we're under this order. I never expected to be getting  
15 supplemental reports and an argument that she's now under  
16 treatment. So, that's why I say that, based upon these  
17 revelations, I want to take her deposition again. I want to  
18 have my experts review all of this material so I'm  
19 adequately prepared. Because the Court in crafting this  
20 standstill order, which I complied with 100 percent, it now  
21 has left me, as I'm realizing what the plaintiff has been  
22 doing, developing new experts, new reports, seeing new  
23 doctors and continuing to treat -- and if they were going to  
24 supplement from January of 2024, timely, then I would have  
25 come in and said, okay, now I want to take his deposition.

1 I want to get my experts to review this. Because what's  
2 happened is by sandbagging me on this case, I'm sitting here  
3 expecting the rules are the same, and they're operating  
4 under different rules.

5 THE COURT: So, I think, then, your point is  
6 because she's sought additional treatment from these  
7 doctors, which is kind of a separate issue, but that the  
8 additional treatment should have been disclosed? I mean,  
9 certainly would have been disclosed had the supplemental  
10 reports been disclosed timely. But you're put in a place  
11 where if she's received additional treatment, you would  
12 generally have anticipated that she was going to testify,  
13 you know, she's not working anymore, I've had these issues.  
14 But that treatment is such that it's more significant and it  
15 alters the playing field.

16 MR. MCGAVIN: It's changed.

17 Excuse me. May I consult with Ms. Blake?

18 THE COURT: Go ahead.

19 MR. MCGAVIN: She wants to ask me or make a point  
20 that I'm probably forgetting.

21 May I step aside for one second?

22 THE COURT: You may. Go ahead.

23 MR. MCGAVIN: Excuse me one second, Your Honor.

24 I think the point Ms. Blake -- I think the point is  
25 that I'm getting wound up, perhaps, and I apologize for



1 that, Your Honor, but I do feel -- nobody cares what I feel.  
2 I think I have demonstrated that, Your Honor.

3 The point is, they do have a duty to supplement,  
4 and it's to timely supplement, whether it's Dr. Haysbert  
5 retired and is now on medication. Even with the Court's  
6 order, that duty to supplement remains, and that would be on  
7 the plaintiff.

8 And it's not adequate just to say, I didn't have it  
9 available to me. You had the plaintiff as your client. And  
10 we'll talk about Mr. Haysbert at the end. I know you want  
11 to compartmentalize that, but you can't take him out of this  
12 case because his fingerprints are all over this, and that's  
13 what's so frustrating having sat -- okay. I'm sorry. I  
14 know you don't want me to go there. I apologize.

15 THE COURT: Well, Mr. McGavin, I am a bit surprised  
16 that you would ask for a continuance, in part because I  
17 think I've been clear to say I've excluded any  
18 information provided to Dr. Filler or any opinions that  
19 could be interpreted as flowing from this new information  
20 provided to him.

21 I will tell you just generally, that having seen a  
22 lot of experts testify, that I think compartmentalizing  
23 Dr. Filler and cabining his testimony is not the same hurdle  
24 that you describe it as, in my mind. For example, I think  
25 you could say to him, you know, your opinions were made as

1 of this date. As of that date you had not reviewed her.  
2 You had not... you know. And then it would be, I think it  
3 would be simple to avoid that issue. That does not address  
4 or remedy this other problem of the additional treatment,  
5 and I am considering your request. But I mean, frankly, my  
6 concern is you're really, then, just asking to open this can  
7 of worms which is, you know, and costs, depositions, new  
8 experts, this whole new round of, well, this is a new  
9 opinion, and this is not supplementation, and I mean just a  
10 mess of things. And frankly, I mean, I guess I'm then just  
11 surprised that you think that that relief is a better relief  
12 for you than the relief that I've given you, and --

13 MR. MCGAVIN: But I'm not done on the relief I'm  
14 seeking, Your Honor. What I'm seeking is, I don't think you  
15 can compartmentalize Dr. Filler. And I saw him testify.  
16 He's a professional. He's an advocate. You ask him his  
17 name, and ten minutes later he's spilling out quite a bit,  
18 and it's going to be a challenge for the Court to  
19 compartmentalize him, and that's what I worry about.

20 I don't want a continuance. I just want a fair  
21 playing field. If I'm playing by the rules, I want the  
22 other side to. And I've suffered through this case,  
23 seven-hour depositions, every one.

24 Mr. Haysbert, I don't want to go back over it, but  
25 there is such a long history of this case, I'm extremely

1 distrustful, and these late disclosures are perfect evidence  
2 of what we have been going through. And the suggestion that  
3 Mr. Haysbert is going to be here for trial, that's -- I  
4 believe -- maybe that's his right, I don't know. The fact  
5 that he's negotiating with these experts. This is tainted.  
6 It continues to be tainted.

7           So, no, I really don't want a continuance. I want  
8 this case over. I don't want to hear about Dr. Haysbert or  
9 Mr. Haysbert ever again. I would be very happy. I have  
10 come up for trial now, this is my fourth time coming up for  
11 trial in this case. And trying a case twice, I've done it a  
12 couple of times, it's not much fun. So, no, truly, I don't  
13 want a continuance, Your Honor. You're right. But I want a  
14 fair and level playing field for once.

15           THE COURT: Let me ask you about Mr. Avrit. In  
16 addition to these timing issues, you talked about  
17 foundational issues as well. Why don't you articulate --

18           MR. MCGAVIN: The floor was dry. The floor was  
19 dry. I don't know why we're talking about potential  
20 condensation when the floor was dry. There is no foundation  
21 for any of this. Plus, he's now testifying as a  
22 meteorologist. He's now going to tell us based upon review  
23 of meteorological data whether or not there is condensation.  
24 And Ms. Morgan contacted us previously, within the past  
25 month, and said, would you consent that the meteorological

1 data is true and accurate? No. We're not doing that. It  
2 was not raining. The floor was dry. The witnesses say the  
3 floor was dry, independent witnesses, two store employees.  
4 Mrs. Haysbert says the floor was dry. Her clothes weren't  
5 wet. Condensation is moisture. So, it's totally irrelevant  
6 to introduce this issue of condensation to this case, which  
7 is moisture, when the floor wasn't even wet.

8 THE COURT: Well, isn't part of the other problem  
9 that his initial report says that the floor was wet because  
10 it rained, and his second supplemental report says the floor  
11 is wet because of condensation? I mean, they're  
12 inconsistent with each other.

13 MR. MCGAVIN: They're both wrong.

14 But the point is, they saw our objection, and  
15 Mr. Haysbert went out and went to Mr. Avrit and said, hey,  
16 let's find a new opinion. And that's what happened.  
17 Obviously. He didn't do this just because. Ms. Morgan  
18 didn't ask him to do it. Somebody asked him to do it, and I  
19 know who. And I'd love to see the emails, how that all got  
20 started. This is just -- fundamentally, it should be  
21 excluded. He should be excluded for two reasons. It wasn't  
22 raining. The floor wasn't wet. And there is no  
23 condensation.

24 And that work order that talks about condensation,  
25 it's irrelevant. We're on notice of a condition at the

1 front of the house that didn't apply on the day in question.

2 There would have to be evidence that the floor was  
3 wet. It was not. Every witness says the floor was dry.  
4 So, I strenuously object to Mr. Avrit's testimony.

5 I strenuously object to Dr. Filler's testimony. I  
6 think he's irreparably tainted. And he's now tried to  
7 bolster everything. He's going to have to come in. It's  
8 going to be a complete nightmare trying to hold him to just  
9 what's in his report, his first report. And we're going to  
10 have so many objections, I'm going to be jumping up and down  
11 like a jack in the box all over again, which I don't want to  
12 do. I just want to sit there quietly. Ms. Blake won't be  
13 there. She's going out on maternity leave, so I'm going to  
14 be all by myself. It's going to be a disaster for me,  
15 Judge.

16 THE COURT: Ms. Morgan, let me hear from you.

17 MS. MORGAN: Thank you.

18 THE COURT: Let me start with Mr. Avrit because  
19 separate from these issues related to Mr. Filler and timing,  
20 and I think I've been clear about the timing issue, but to  
21 me there has been this other kind of fundamental problem  
22 with Mr. Avrit in that you have these second set of opinions  
23 that are directly contrary to his first set of opinions and  
24 it's a --

25 Do you want to be heard on how you want to proceed

1 on him?

2 MS. MORGAN: Yes, Your Honor, thank you.

3 I would like to just start talking about the case  
4 generally. I have tried and I will continue to try to  
5 change the tenor of this case. The way that Mr. Haysbert  
6 did things is not the way that I do things. I have  
7 practiced in the Eastern District of Virginia for 25 years,  
8 and, frankly, I was appalled at some of the things that  
9 happened in this case on both sides, so that is not where I  
10 am headed.

11 And I can tell this Court that nothing that has  
12 been done, at least with respect to me, has been deliberate  
13 in any way. I have an obligation to tell the Court the  
14 truth. I have not been involved in this case for very long.  
15 It has taken me a long time to get through the substance of  
16 this case. My involvement has only been on the sanctions  
17 and the Bar complaint and related matters. And it is taking  
18 everything I have just to get through some of this data and  
19 understand it.

20 And so, you know, I'm a little bit offended about  
21 the deliberateness, because that was absolutely not my  
22 intent, and I gave the reports as soon as I had them. And I  
23 believe it is appropriate to be penalized in the form of  
24 those supplemental reports being excluded. I think that's  
25 fair. I would expect no less as a defense attorney.

1           In terms of a continuance, this is where we kind of  
2 have the same issue. Now, Mr. McGavin got up here and said,  
3 we have complied, we have complied, we have complied. I  
4 don't know that he hasn't complied.

5           If I put Marcus Wilson or Nick Seifert or somebody  
6 from Outback or Bloomin' Brands on the stand, it's been a  
7 year and a half or a year and four months. They might say,  
8 oh, I no longer work at Outback. Things have changed  
9 because, as the Court commented, lives go on, and there is  
10 nothing I can do about that.

11           I don't necessarily want a continuance. I would  
12 love to have more time. But I think it just opens a can of  
13 worms about where we go from here because everybody's lives  
14 go on in the case. So, I'm at a disadvantage from that  
15 standpoint as well because I haven't taken supplemental  
16 depositions. I don't know if even the addresses that I have  
17 for these witnesses are even correct, so we're all kind of  
18 in the same boat, and so I could not advocate for a  
19 continuance. I think we just go forward.

20           So, in terms of Mr. Avrit, I did ask -- like, you  
21 know I saw the comment about the floor in his original  
22 report. And I said, well, I don't know if that's enough.  
23 Is there a supplemental report? I thought maybe one had  
24 been done, and lo and behold there had been. I don't think  
25 it's much better. I think it's probably inconsistent, and

1 maybe that's just his thing. So, I do not intend to call  
2 him if the Court will not allow his supplemental report to  
3 come in. I think there is no benefit to doing that. I see  
4 most of his opinions -- and I told Ms. Blake this earlier --  
5 as treading on ground that wouldn't even be admissible in  
6 the first place. So, if that's the Court's ruling on that,  
7 then I will strike him as an expert witness.

8 I'm trying to streamline this case and make it as  
9 seamless as possible, Your Honor. So, I think that  
10 addresses your question about him.

11 I think that, you know, that's really all I have to  
12 say. I think the sanction of not bringing this stuff in is  
13 appropriate.

14 I think we'll just have to deal with Dr. Filler. I  
15 mean, I wasn't there. He did have long dialogues, but he's  
16 an expert witness, and he's a very, very, smart man, but  
17 we'll figure it out.

18 THE COURT: What is your understanding of  
19 Dr. Haysbert's -- how would you characterize the current  
20 status of her treatment relating to the issues that she says  
21 were caused by the fall?

22 MS. MORGAN: I think that the medication Aricept --  
23 I'm not sure how you pronounce. It's referenced on the last  
24 page of his report -- I think it's helping. I don't know  
25 that she's a hundred percent, but I do think that there is



1 some indication that it's helping her.

2 THE COURT: So, just so I am understanding, she is  
3 currently on medication that Dr. Filler placed her on?

4 MS. MORGAN: Correct, yes. And obviously we'd like  
5 to -- I mean, I think that's actually beneficial for the  
6 defendants to bring in, you know, but if we don't get to  
7 talk about that, then we don't get to talk about it.

8 THE COURT: I know that the report indicates that  
9 there was a Zoom treatment.

10 MS. MORGAN: Telehealth.

11 THE COURT: Telehealth appointment.

12 MS. MORGAN: Yes.

13 THE COURT: Has she subsequently been seen by  
14 Dr. Filler?

15 MS. MORGAN: Not that I'm aware of.

16 And I just thought about one other thing. If you  
17 remember from the trial transcripts, her physician that she  
18 was dealing with, Dr. Chinnery, he passed away. So, I mean,  
19 she -- and she has a traumatic brain injury, and she needs  
20 treatment, so, I mean...

21 THE COURT: Is she seeing any other doctor?

22 MS. MORGAN: I don't think so, but, again, part of  
23 this is I don't know what I don't know on the plaintiff's  
24 side, so.

25 THE COURT: All right. Do you want to say anything

1 else?

2 MS. MORGAN: No, thank you.

3 THE COURT: I'm at some point going to take a brief  
4 recess, so I'm going to put a pin in this for just a moment.  
5 I think I can deal with the other motions fairly quickly, so  
6 I think we should just do that, and then I'm probably going  
7 to take just a brief recess.

8 Okay. So, let me, I know we have some associated  
9 exhibits, but I'm going to talk about those I think at the  
10 end.

11 There is the defendant's motion regarding corporate  
12 indifference.

13 MS. MORGAN: That's not our trial theory.

14 THE COURT: All right. And I'm going to grant  
15 their motion. Frankly, you're not seeking punitive damages.  
16 There is nothing you could point to which would indicate  
17 that that speaks to any relevance or issue in the case, and  
18 so it could only be admitted and used for an impermissible  
19 purpose.

20 MS. MORGAN: I think what I had explained to  
21 Ms. Blake was, you know, I can't predict exactly what  
22 questions I would ask. And I told her I thought that if I  
23 had somebody from Outback on the stand, I might ask a  
24 question like, did anybody follow up with her? I see that  
25 as the very limit of -- you know, I think the answer to that

1 question is no. The jury can infer whatever they want to  
2 infer from that.

3 THE COURT: And that's their motion, and that's  
4 what I am ruling on.

5 MS. MORGAN: Okay.

6 THE COURT: I am granting their motion, and I'm  
7 excluding that.

8 MS. MORGAN: Okay. So, you don't want me to ask  
9 that question?

10 THE COURT: Correct.

11 MS. MORGAN: Okay.

12 THE COURT: There is a motion regarding internal  
13 policies, I think that may be resolved.

14 Is that resolved?

15 MS. BLAKE: It should be if Bloomin' Brands is  
16 dismissed.

17 MS. MORGAN: Yeah. We're not trying to establish  
18 ownership and control, so... and I think the case law is  
19 correct that it doesn't come in.

20 THE COURT: I agree.

21 All right. There is the brain map demonstrative  
22 and the PowerPoint demonstrative. I just also want to be  
23 clear. I understand some of these would be implicated by  
24 other rulings, but I think it's as helpful as possible for  
25 me to clear up as many things and then deal with remaining

1 issues, so that's why I am dealing with these two.

2 My understanding is these are -- and there is now a  
3 new rule that talks about illustratives or an amendment to  
4 Rule 107, those things that help the jury understand the  
5 evidence, they are not evidence, they don't go back to the  
6 jury. I don't think my scheduling order addresses things  
7 like an opening PowerPoint, a closing PowerPoint, or a  
8 PowerPoint that you might use with an expert. I think in  
9 more complicated cases I have the parties disclose them a  
10 couple of days in advance so that I can deal with any  
11 objections in advance so that we don't have trial issues, so  
12 like a couple of days before trial.

13 What's the issue with the brain map demonstrative  
14 that currently exists?

15 MS. BLAKE: The issue is that we have not been  
16 provided with any foundation as to where -- I mean, so it's  
17 -- I think it's been represented to the Court that these are  
18 Dr. Filler's or whoever took the DTI imaging, it is the DTI  
19 imaging that has been made into a 3d animation. But by who?  
20 The issue is at the last trial Dr. Filler testified that he  
21 had never seen this brain map demonstrative, and all we now  
22 have is plaintiff's counsel's representations that now  
23 Dr. Filler has seen the demonstrative, and he intends to lay  
24 the foundation, but I think that that does then go back to  
25 the Court's order froze this case in time. He's been

1 provided supplemental materials, and now he intends to move  
2 things around, and we don't exactly know how.

3 I don't know who this third-party company is. It's  
4 not been disclosed. I don't know how this was created, or  
5 when it was created, and for what purpose it was created.  
6 It was just kind of something that was provided to us mid  
7 trial.

8 THE COURT: I'll be frank. That happens all of the  
9 time. I mean, you have images, they're put into some trial  
10 prep by some third-party that deals with attorneys that does  
11 this. I mean, unless there is like an allegation that that  
12 imaging or the demonstrative in some way changes the  
13 imaging, I mean, that's why -- I mean, typically I would say  
14 it needs to be provided slightly in advance of trial so that  
15 if there are any issues like that, there is no prejudice, a  
16 party can object in advance. But they can create a  
17 demonstrative with those exhibits. She could do that today  
18 for purposes of trial. I mean, you could do that. You know  
19 you could take some exhibit and make a PowerPoint that you  
20 want to walk through with your expert. I think there is a  
21 good reason in this case to have people disclose them early.  
22 But it's not an exhibit, it's a demonstrative. And I guess  
23 what I'm saying is on the basis that you say, I'm going to  
24 overrule your objection.

25 I am going to require that any demonstratives,

1 PowerPoints that are going to be used, I think it would be  
2 helpful that they be provided in advance. At least anything  
3 that is to be used with a party, like an expert, I'll have  
4 you produce those. I was going to do the Wednesday before  
5 our current trial date. I'll let you meet and confer if you  
6 want to make an agreement regarding PowerPoints for openings  
7 and closing. Normally, parties don't, or if they do, it's  
8 literally like an hour or two before just so you can look  
9 and make sure there is nothing objectionable. I have done  
10 that in my patent cases. A case like this, normally parties  
11 wouldn't do it. If you guys want to talk about it and agree  
12 to something, that would be fine.

13 And if you think that there is an issue, I mean,  
14 obviously I think there will have to be some testimony from  
15 Dr. Filler to the demonstrative, that it's the images that  
16 he's previously reviewed. If that doesn't happen and you  
17 want to object on that, then I will take that up at the  
18 time.

19 The PowerPoint, I guess my question is, does that  
20 guidance clarify your objection relating to the PowerPoint?

21 MS. BLAKE: Unfortunately, no.

22 The PowerPoint contains -- I mean, it's many, many  
23 pages long. There is a lot of treatises in there that I  
24 don't think the foundation for the hearsay exception has  
25 been laid at any point. I don't -- again, I understand the

1 Court's decision, we can object at trial to maintain those  
2 objections if they're not, but those treatises were not  
3 disclosed in the initial report. The copies of them,  
4 pursuant to the Rule, weren't provided. So, that's the main  
5 objection to the PowerPoint as well as the inappropriate  
6 headers.

7 This is the problem, and I don't want to rehash  
8 over our prior arguments, but with Dr. Filler's report, his  
9 opinion essentially is that Dr. Haysbert's brain imaging is  
10 consistent with a number of things, and in his PowerPoint he  
11 has that her brain injury is consistent with quite a few  
12 symptoms or at least some symptoms -- I don't have them all  
13 memorized -- that are not symptoms that she has ever  
14 complained of. And so, at that point we just find it  
15 prejudicial to put it up on a screen in front of the jurors.

16 THE COURT: All right. So, I mean, I looked at it.  
17 I did not look at it in-depth. I will tell you that my view  
18 is, it is not a PowerPoint that I would use for a jury. I  
19 think it's way too much, too much information. But I'm  
20 going to deal with it in the same way, which is that  
21 PowerPoints, the brain map demonstratives, anything else  
22 that falls into that type of category should be shared with  
23 the other party no later than Wednesday before trial.

24 If there are remaining objections, then what I'll  
25 have you do is just file a notice with the Court no later

1 than close of business that Friday indicating, you know,  
2 what's at issue, and forwarding via email to my law clerk  
3 the PowerPoints at issue. The notice should at least  
4 identify, you know, defendant objects to pages blah, blah,  
5 and blah because they contain whatever, so I can understand  
6 what I'm looking at.

7           What I would like, if there are issues, what I  
8 would do is, we'd start court a bit early the morning of,  
9 and we would go through it, and I'm going to rule on them,  
10 you know, that comes out, whatever. You know, the way this  
11 would typically work is if it's like one or two isolated  
12 things, then I'm going to rule on those, and I am going to  
13 expect you to change the PowerPoint. If the PowerPoint is  
14 infected to such a degree, I certainly might reach the point  
15 that I'm like, look, I'm done, we're not using this, and  
16 that's how we'll proceed.

17           So, I just wanted to put you on notice that I  
18 recognize you've worked on these. You should be meeting and  
19 conferring on them before you file anything with me. But to  
20 me, that's the best way. These are things that are kind of  
21 produced as you get very close to trial, but this avoids  
22 having issues that come up right in the middle of trial.  
23 All right.

24           MS. MORGAN: To the degree that it's already been  
25 produced we don't need to reproduce it, though, correct,



1 just if there is anything other?

2 THE COURT: Right. I mean, if you've produced the  
3 brain map demonstrative and this PowerPoint demonstrative,  
4 if there are others that have been exchanged and those don't  
5 change, I don't think you need to provide them again to the  
6 other party.

7 Okay. That is all, other than this issue with now  
8 just Dr. Filler that I believe we need to address; is that  
9 right?

10 MS. BLAKE: I would just, regarding the  
11 demonstratives, I am only -- it's a little bit difficult  
12 because I think we're all walking into this case -- well,  
13 Mr. McGavin definitely has the most experience out of all of  
14 us. But I am aware of the brain map animation and the  
15 PowerPoint. I have those two things. I am putting it on  
16 the record that if there are any other things, I do not know  
17 about them, and I would just appreciate that being  
18 disclosed.

19 THE COURT: All right, and I'll order it. I mean,  
20 everyone is at the same deficit I think.

21 Before I take a break, let me just address  
22 Mr. Haysbert's involvement generally. I think that  
23 Mr. Haysbert is entitled to observe the trial in this matter  
24 as an audience member. It's an open court. I don't think  
25 it would be proper for me to exclude him. Well, I think I

1 could exclude him, but I don't think I have done so yet.  
2 And I'll just say at this point given the information that I  
3 have, I'm not excluding him from trial. I think he's, as a  
4 member of the public, permitted to be present and to  
5 observe.

6 I addressed this previously regarding his dual role  
7 as a family member to his mother and previous counsel to  
8 her. And my recollection of what I said and what we talked  
9 about was, he is, of course, is her, the plaintiff's son.  
10 But he made the decision to be her counsel of record and to  
11 appear in this case. He was then subsequently removed from  
12 the case, and his *pro hac vice* was revoked. It is in my  
13 view in no way appropriate for him to involve himself in  
14 this case in a way in which an attorney would. He can't  
15 represent her related to this case in any way. He made that  
16 decision when he chose to represent her. And so, he can't  
17 now say, well, I'm her son, so I get to do some things as an  
18 attorney, but I'm not appearing in court on her behalf. No.  
19 He appeared as counsel of record in this case, and his *pro*  
20 *hac vice* was revoked, and the Court ordered him not to be  
21 involved as counsel in this case. That's my understanding  
22 of the Court's order. I could certainly be corrected if I  
23 am wrong.

24 And so, I recognize that there could be a line  
25 there. So, for example, I think it's appropriate for a

1 child to drive their parent to a medical appointment or even  
2 set up the appointment. It would not be appropriate to  
3 communicate with witnesses or experts in the case regarding  
4 their testimony and their expert opinions. That is legal  
5 representation. I don't think there really could be a  
6 dispute about that. I am very concerned that this may be an  
7 issue that the Court has to deal with, but I am endeavoring  
8 to because he is not currently counsel of record. So,  
9 really the issue, if there were a violation, would be  
10 whether or not he's in violation of the Court's order.

11 Now, I recognize Mr. McGavin's point, which is  
12 true, that could be separate, but if they've suffered harm  
13 as a result of an alleged violation of a court order, then  
14 certainly that would be an issue that affects the case.  
15 It's somewhat different. Those are my thoughts on where  
16 that stands at this point.

17 I think it would be helpful, I'm going to take a  
18 brief recess.

19 Let me ask you all. Defendants have asked for a  
20 continuance. Do you want an opportunity --

21 Mr. McGavin, Ms. Morgan has put some information on  
22 the record regarding the changes, that she's aware of them,  
23 although it sounds like there may be some information that  
24 she's not aware of. Would you want the opportunity, for  
25 example, in a very short turnaround to have her file

1 initially an update? So, really this would be, you know, I  
2 think she's on medication, if she's obtained any additional  
3 treatment, anything that is materially different from her  
4 prior testimony, and then if you wanted to articulate your  
5 reasoning regarding a new trial? Do you want that  
6 opportunity? Would you like to see that before I rule on  
7 your request for a new trial or a new trial date?

8 MR. MCGAVIN: I don't want a continuance, Your  
9 Honor.

10 THE COURT: Okay.

11 MR. MCGAVIN: I'm just -- I don't know how to  
12 comply with the Court's orders and then have Ms. Morgan in  
13 the position to say, I don't know what's been going on with  
14 Mr. Haysbert.

15 But he is tainting the case, and this is why I  
16 think the remedy is -- as I've thought about it over these  
17 proceedings -- Mr. Avrit is out. And essentially, he's out  
18 because his opinions were late designated and not supported.  
19 But I think Dr. Filler should be out because what happened  
20 is in violation of the court order, and that should be the  
21 consequence.

22 And I'm left with trying to compartmentalize a key  
23 witness who I know is going to be an advocate and he -- what  
24 happened there, and Ms. Morgan knew nothing about it, it had  
25 to be set up. Mr. Haysbert was involved, obviously. He had

1 the report. She didn't. And he was running this. And I  
2 think the penalty is he should be out. I shouldn't have to  
3 be up here trying to do the gymnastics of trying to  
4 compartmentalize his testimony because what they did so  
5 obviously is, he recognized, Mr. Haysbert recognized the  
6 weaknesses in that opinion. Ms. Morgan had nothing to do  
7 with it. And she's being very clear, don't penalize me.  
8 You know, I don't know what's going on over there with  
9 Mr. Haysbert. Well, Dr. Filler didn't do a new report  
10 because Ms. Morgan asked for it. And Dr. Haysbert has said  
11 she's got a brain injury and can't represent her herself.  
12 So, obviously Mr. Haysbert went and said, hey, you got to  
13 work up a new report, Dr. Filler, so we can fix all of the  
14 problems that Mr. McGavin raised. And that's wrong. That  
15 violates the court order, and Dr. Filler should be out.  
16 That's the penalty.

17 THE COURT: All right.

18 Ms. Morgan, anything you want to add? I mean,  
19 we've developed a bit, and that's fine. I appreciate that  
20 you're both willing to think on your feet and then make  
21 adjustments as we're going through, but I'll give you just a  
22 chance if you want to add anything.

23 MS. MORGAN: I don't really have anything. I mean,  
24 we're just covering the same ground, so...

25 THE COURT: All right. Anything else? I'll take a

1 brief recess. Anything else you all think we need to  
2 address?

3 MR. MCGAVIN: Pardon me, Your Honor. I was just  
4 conferring with Ms. Blake.

5 No, thank you.

6 THE COURT: Thank you all. We'll take just a five,  
7 ten-minute recess. Thank you.

8 (Court stood in recess from 12:08 p.m. to  
9 12:23 p.m.)

10 THE COURT: All right. Thank you all for your  
11 patience.

12 I can go ahead and rule on this issue with  
13 Dr. Filler. I am going to exclude Dr. Filler from the  
14 trial. You know, I think it is clear that there was not a  
15 timely supplement made to his expert report, and I think I  
16 have to consider that in the context of the case in its  
17 entirety, as well as the fact that when I consider the  
18 prejudice articulated by the defendants, I think that it's a  
19 fair point that they're making. I think they have or would  
20 suffer prejudice that I can't entirely address by  
21 limitation. And so given those things, I think that that's  
22 an appropriate sanction under Rule 37 is for his exclusion  
23 from trial, and so that's the ruling that I will make  
24 related to him.

25 I think, then, that deals with all of the motions

1     *in limine*.

2             Let me tell you how we'll deal with the Final  
3     Pretrial Order. There have been a number of, I think,  
4     exhibits that have potentially been withdrawn or may be  
5     withdrawn based upon my ruling. Unfortunately, I have a  
6     couple of criminal matters I have to take up, and so I don't  
7     think I have the time to go through the remaining objections  
8     outside of the motions *in limine*, and I think I likely would  
9     have reserved on many of those anyway given that most of  
10    them are, I think, on foundation or relevance.

11            So, what I'd ask the parties to do is, by the close  
12    of business tomorrow, if you could send an email to my law  
13    clerk just indicating if there are exhibits or witnesses  
14    which you intend to withdraw given the rulings that I have  
15    made; that will help us then early next week enter the Final  
16    Pretrial Order reflecting those changes without having to go  
17    through it right now, and have you all think about those  
18    things right now. And I'd also ask that when you do that,  
19    obviously, you need to copy the other side, but if you could  
20    also send her a Word version of the proposed Final Pretrial  
21    Order.

22            Any questions about that or any --

23            MS. MORGAN: Yes.

24            THE COURT: -- exhibits or witnesses you think I  
25    especially need to address?

1 MS. MORGAN: Your Honor, at least for me, for  
2 purposes of the record, may I be heard about Dr. Filler and  
3 Mr. Nazareth Haysbert?

4 THE COURT: Go ahead.

5 MS. MORGAN: Thank you.

6 So, as I understand your ruling, you're excluding  
7 Dr. Filler entirely from this trial?

8 THE COURT: That's correct.

9 MS. MORGAN: Okay. I'm just going to raise an  
10 objection, respectfully, but he's already testified at this  
11 trial, and I think at a minimum what he did was merely  
12 follow-up with his patient within a period of four months,  
13 which he had set up, not necessarily through Mr. Haysbert  
14 but through Dr. Haysbert herself and saw her. I understand  
15 why that should not come in. But his testimony in total,  
16 that is, that is sanctioning the plaintiff for something  
17 that she did to treat herself in this case, and now she  
18 doesn't have the one person who is treating her at least  
19 being able to come in and testify as to the images and  
20 everything he did before, that he already testified to? I  
21 think the solution for that could be, Your Honor, is just  
22 reading in his testimony from the prior trial, instead of  
23 bringing him, and then you compartmentalize it altogether,  
24 and you don't go into other areas that are off bounds or  
25 anything. But this, that sanction, perhaps it is within



1 your power of Rule 37 -- I didn't look it up -- but I think  
2 that's a very, very, strong sanction for the plaintiff  
3 simply doing what she had intended to do from the time that  
4 he was engaged in the first place and that she did on her  
5 own without her involvement of her son, by simply following  
6 up. So, I just would ask that you reconsider that position  
7 or even let me brief if it if possible. Now, again, the  
8 remedy would just be, let's read in his testimony from  
9 before. I thought about that earlier. And I forgot to  
10 mention it.

11 Now, in terms of Mr. Haysbert, you indicated that  
12 it was in no way appropriate for him to be involved in any  
13 way, and I would, again, respectfully disagree with that. I  
14 can brief it, if you wish. But I understand he's no longer  
15 *pro hac vice* counsel, and he should not do anything related  
16 to the court, but he is the only individual who is alive --  
17 because Mr. McKelvey passed away -- that I can consult with  
18 on things that happened in the prior trial. I did not try  
19 that case. I was not involved in the trial of that case.

20 So, if there is a witness on the stand -- and I  
21 just raise this as way of an example -- and they say  
22 something, and I wonder what they said before, and I want to  
23 impeach him, he's going to be the fastest source for me to  
24 go to and say, hey, do you remember what day or what this  
25 person said, and point me to something in the trial

1 transcript. I mean, that's what his role needs to be as  
2 former trial counsel. That is not him being counsel of  
3 record in this case.

4 Which I went back and actually looked at the  
5 Court's ruling on it and her order, and it didn't say that  
6 he couldn't be an attorney for his mom. It just simply said  
7 that she was revoking his *pro hac vice*. It was very sort of  
8 bland in that way. I don't think it was very specific, and  
9 I don't remember exactly what it said, but I did go back and  
10 look at it before I even consulted with him, and I felt that  
11 I was within the parameters.

12 And I also asked the Bar on this issue as well, and  
13 they said, well, he can't, obviously, participate in any of  
14 the court proceedings, but he can consult with you, and that  
15 was the advice that I was given.

16 So, I just feel like that's too blanket of a  
17 statement.

18 THE COURT: Well, let me clarify my statement.

19 MS. MORGAN: Okay.

20 THE COURT: Because I did not intend my statement  
21 to be that he could have no involvement with his mother.  
22 You specifically talked about this idea of, you know, you  
23 speaking with him about his representation, making sure you  
24 get the documents, for example, what records does he have,  
25 things like that. I do think that's appropriate.

1 MS. MORGAN: Okay.

2 THE COURT: I think that would be necessary for  
3 effective representation for you to assume the file. I do  
4 see some difference between that, you know, let me just make  
5 sure you have the file and ongoing participation such as you  
6 described now, and then separately during the trial. So,  
7 there is kind of two issues which to me would be like an  
8 ongoing consultation regarding the development of the trial  
9 or the ongoing legal representation and then in court  
10 consultation, which is obviously much closer to appearance  
11 in this court.

12 MS. MORGAN: And I'm not saying that I would  
13 absolutely have to do that, it just might be the case.

14 THE COURT: This is not something that I went back  
15 and looked at either Judge Smith's rulings or my rulings  
16 specifically regarding the limitations. I mean, it sounds  
17 like this may be an issue at trial, and I would rather have  
18 it clearly delineated. I think it's better to have it  
19 delineated than not.

20 So, if you'd like to file, really, I think it could  
21 be like a five-page brief regarding what you understood the  
22 limitations to be and then whether or not there are any  
23 rules that would come into play that I would need to  
24 consider.

25 MS. MORGAN: Okay.

1           THE COURT: But I guess to clarify, to me there is  
2 a difference from representing his mother in unrelated  
3 matters, legal matters. Certainly, I don't think that was  
4 touched. That's different from representing her interests  
5 as it relates to this case. And there could be some overlap  
6 between what one could maybe imagine as like familial  
7 responsibilities and attorney responsibilities, and my point  
8 there was, you can't claim that things that an attorney  
9 could do are now your familial actions and not attorney  
10 actions when, for example, you could do them as her attorney  
11 on her behalf. It was that distinction I was trying to  
12 draw.

13           MS. MORGAN: I understand.

14           THE COURT: I don't think the defense would  
15 need -- if you want to respond, you're welcome to.

16           MR. MCGAVIN: We will not respond, Your Honor.

17           THE COURT: Very well.

18           I'll give you a week to do that. Is that enough  
19 time?

20           MS. MORGAN: Yes. I may not.

21           THE COURT: Very well.

22           MS. MORGAN: But if I do it, it will be within a  
23 week.

24           THE COURT: All right. I suspect defense would,  
25 regarding the motion to reconsider, you would object to that

1 on the bases that you previously stated?

2 MR. MCGAVIN: Yes, Your Honor.

3 And there is no evidence that Dr. Haysbert set this  
4 up. There is no evidence at all. It's just a -- I don't  
5 know. So, I strenuously object to reconsidering.

6 THE COURT: Ms. Morgan, your objection is noted.

7 MS. MORGAN: Thank you.

8 THE COURT: All right. So, let me just go through  
9 a couple of minor things with you all so we know we're all  
10 on the same page. This will be tried in Newport News.  
11 Obviously, we're starting on February 25th. It's currently  
12 set for five days. If you don't think that it will be five  
13 days, please let me know, because I might shift you back one  
14 day because I have a criminal trial up until the Monday  
15 before. I anticipate we can keep your date. It won't be an  
16 issue, but I just --

17 MS. MORGAN: Your Honor, can I address that real  
18 quick?

19 THE COURT: Go ahead.

20 MS. MORGAN: I do have an issue. So, if I am not  
21 calling Filler and Avrit, I can't get Dr. Haider here until  
22 the 27th. She's coming in the evening of the 26th. I don't  
23 know that I can -- I'm trying to streamline this as much as  
24 possible -- I don't know that I can fill two days and then  
25 get to her, so...

1 THE COURT: Do you anticipate, then, that your case  
2 would be tried in two days, meaning if we moved it to  
3 Wednesday, Wednesday and Thursday?

4 MS. MORGAN: I think it would take no more than  
5 three.

6 THE COURT: All right.

7 And defense, you anticipate, I think you said  
8 previously, a day?

9 MR. MCGAVIN: Yes, Your Honor. I'm trying to think  
10 of scheduling.

11 MS. MORGAN: So, my point, Your Honor, was I would  
12 prefer to start a day later, so like if we did wrap up, we  
13 would have Haider here. I don't want us sitting around with  
14 nothing to do the afternoon of 26th.

15 MR. MCGAVIN: Your Honor, can I address that?

16 I'm happy to let her testify out of turn. I would  
17 like to keep the current schedule because wrapping over a  
18 weekend to come back, it's just more travel for me. It's  
19 another hotel night that I would rather avoid, and I would  
20 prefer to keep the current schedule and finish this case  
21 within one contiguous week and also not have a jury leave  
22 and spend that time. So, if it means I take Dr. Haider out  
23 of turn, I'll do that. I want to get this done, but I don't  
24 want to have to come back over another weekend.

25 THE COURT: All right. We'll proceed in that way.

1 I do anticipate my other trial should be resolved by Monday.  
2 We will start on Tuesday. With his concession, I think it  
3 is preferable to have it dealt with in one week.

4 MS. MORGAN: And I still have a sentencing on  
5 Friday that I had made the Court aware of.

6 THE COURT: That's not with me?

7 MS. MORGAN: No. But it's here in Norfolk.

8 THE COURT: All right. And which judge is that  
9 with?

10 MS. MORGAN: It's either -- it's Judge Gibney.

11 THE COURT: It's Judge Gibney, all right.

12 All right. My plan is --

13 MS. MORGAN: I'm sorry. I misspoke. It's Judge  
14 Allen. I have two right now. It's Judge Allen.

15 THE COURT: All right. My plan right now would be  
16 to generally start at 10:00 a.m. the first day, 9:30  
17 thereafter. If we have things that I think we need to deal  
18 with, I may very well say I want you all here at 8:30 or  
19 sometime earlier so that we can deal with those before the  
20 jury. My intention would be to have the jury coming in at  
21 10:00 a.m.

22 I will tell you that I very often will ask the jury  
23 if their preference is, for example, to start early, earlier  
24 than, for example, 9:30, like 8:00 or 8:30, we'll start  
25 earlier because my goal is to get it done. I think it is

1 preferable to have it done in one week rather than wrap  
2 around as well.

3 I try to take one break in the morning, one in the  
4 afternoon, and a lunch break, though typically, I may delay  
5 the lunch a bit if we're right in the middle of a witness or  
6 something like that. It's helpful for me if you guys just  
7 give me updates about timing so I can make those decisions.

8 We'll seat eight jurors in total. There will be no  
9 alternates. What I'll do is select initially a panel of 14  
10 individuals. You each get three strikes, and we'll go back  
11 and forth starting with plaintiff, meaning your board will  
12 have 14 individuals on it.

13 The board will be handed to you, Ms. Morgan. You  
14 strike one, back and forth until you have each struck three,  
15 leaving eight individuals. That's your jury.

16 You've submitted *voir dire*. I will review it.  
17 I'll conduct the *voir dire*. What I typically do is, if  
18 there are sensitive issues, I'll typically let the panel  
19 know that they can come forward, and I'll handle it at a  
20 sidebar. Here, occasionally I will ask during that sidebar  
21 if the attorneys have additional questions so that if there  
22 is some sensitive issue, we can deal with it all at once  
23 rather than having that witness come back up.

24 I'll read the witness list for the jury so that  
25 they'll know whether they know any of the individuals.



1 I allow the jury to take notes.

2 I will provide preliminary instructions. I will do  
3 jury instructions after your closing arguments.

4 I know you all know this because you have tried  
5 cases here, but both of these courthouses are fairly small,  
6 and there is a prohibition on any communications with  
7 jurors, but just please remind any of your staff, just be  
8 careful in the elevators and things like that.

9 Regarding any exhibits, if you do anticipate  
10 presenting exhibits in paper form or on an ELMO or through  
11 your laptops, do you know?

12 MS. MORGAN: I like to use the ELMO primarily.

13 THE COURT: Okay, primarily.

14 Mr. McGavin.

15 MS. BLAKE: I typically will use the ELMO, but I  
16 will also have it on trial pad on my iPad, so I can do  
17 either.

18 THE COURT: All right. If you're using something  
19 other than the ELMO, you need to make sure with IT prior to  
20 the day of trial that your equipment is working, and you  
21 have the right connections and things that you need for  
22 those to present.

23 Understand that my courtroom deputy, if you just  
24 throw something up on the ELMO, she's not showing it to the  
25 jury unless you have moved to admit it, and which I admit

1 it, and then it will be shown, or it's clear because you're  
2 saying this has been previously admitted. She is not going  
3 to know always that an exhibit has already been admitted,  
4 and so if it's previously been admitted, you need to say,  
5 this has previously been admitted as exhibit whatever, so  
6 that she can hit the button to ensure that the jury is  
7 seeing whatever you're trying to show.

8 My order requires three paper sets of exhibits, so  
9 that's one for the courtroom deputy, the law clerk, and the  
10 witness. My courtroom deputy will essentially be keeping  
11 track of what's been admitted so at the end of the trial,  
12 after she consults with you, her version can go back to the  
13 jury. I think she would like you to send the exhibit list  
14 in a Word document as well, so that she can make any  
15 modifications as we're going along.

16 I think I said this before, but I will tell the  
17 jury, but it is an area of confusion, that any of these like  
18 PowerPoints or your opening statements, if you use a  
19 PowerPoint, those things are not going to go back to the  
20 jury.

21 I think you all had previously moved to exclude  
22 witnesses, and that motion would still be the case. I see  
23 some nodding heads.

24 MS. MORGAN: I wasn't here but, yes, that would be  
25 a motion.

1 THE COURT: That motion will be granted, and the  
2 witnesses will be excluded.

3 I take it from Ms. Morgan's statement that you  
4 understand that we will be moving along, and the expectation  
5 is unless prior arrangements are made with opposing counsel  
6 and the Court that you need to have all of your witnesses  
7 ready to go. The goal is to efficiently try this case so  
8 we're not keeping the jury unnecessarily long.

9 And it is my practice, I mean, I understand that  
10 everyone would like to take more breaks, but I'm just trying  
11 to get the case tried, and we're going to power through it.

12 Your phones are coming in with the pouches. Those  
13 will be opened if you request, but if you want anything  
14 else, just submit your electronics form so that I can review  
15 that.

16 I think that is everything you would need to know  
17 that's a bit different regarding how we will conduct trial.

18 Do you have any questions, Ms. Morgan?

19 MS. MORGAN: No, Your Honor.

20 THE COURT: All right.

21 Mr. McGavin?

22 MR. MCGAVIN: No, thank you, Your Honor.

23 THE COURT: All right. Well, thank you all for  
24 being here. I appreciate it. And I look forward to  
25 receiving those couple of additional things we talked about.

1 Thank you all. We'll stand in recess.

2 (Proceedings concluded at 12:44 p.m.)

3  
4 CERTIFICATION

5  
6 I certify that the foregoing is a correct transcript  
7 from the record of proceedings in the above-entitled matter.

8  
9  
10 \_\_\_\_\_/s/\_\_\_\_\_

11 Jill H. Trail

12 January 21, 2025  
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JILL H. TRAIL, Official Court Reporter